

**ROBERT D. MURPHY**  
Claimant

**HAY & FORAGE N/K/A AGCO, INC.**  
Respondent

**ZURICH US INSURANCE CO.**  
Insurance Carrier

In contrast, the respondent requests the Appeal Board (Board) to affirm the ALJ's preliminary hearing Order. Respondent contends claimant has a long history of previous left shoulder injuries. Respondent argues that claimant's need for surgery and his current need for medical treatment, if any, is the result of those preexisting injuries and not the result of a new injury caused by repetitive activities while working for the respondent.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the preliminary hearing record and considering the arguments contained in the parties' briefs, the Board makes the following findings and conclusions:

Claimant filed his application for a hearing on December 31, 2001. In that application, claimant specified a date of accident of "April 2001 and each and every work day thereafter." At the preliminary hearing, the parties, however, agreed to a date of accident of May 9, 2001, the day before claimant's left shoulder surgery.

At the conclusion of the March 8, 2002, preliminary hearing, the ALJ announced his finding that claimant failed to sustain his burden of proving he suffered a permanent accidental injury arising out of and in the course of his employment with the respondent for the claimed May 9, 2001, accident. The ALJ's reasoning was based on claimant's lengthy history of left shoulder problems not related to his work for respondent. Additionally, the ALJ found that the medical evidence admitted into the preliminary hearing record coupled with claimant's testimony, also failed to prove that claimant suffered a permanent aggravation of his preexisting left shoulder condition.

On April 3, 2001, claimant reported to Brenda Laughlin, a registered nurse employed as the medical supervisor for respondent's health services. Claimant provided Ms. Laughlin with a history of "Left shoulder pain-ongoing for a long time. No known injury." At that time, claimant also notified Ms. Laughlin that on his own he had made an appointment to see a doctor in Hutchinson concerning this ongoing left shoulder pain. After claimant saw Dr. Jonathan Loewen, claimant returned to health services on April 16, 2001, with work restrictions. Respondent was unable to accommodate those restrictions. In Ms. Laughlin's April 16, 2001, Treatment Record, she noted claimant made the comment that Dr. Loewen had indicated to claimant that it was too bad that claimant's left shoulder condition was not related to his work for respondent, because workers compensation would then pay for the treatment.

Claimant first saw orthopedic surgeon Dr. Loewen on April 11, 2001. Claimant gave Dr. Loewen a history of left shoulder pain going on for 10 to 12 years with several significant injuries. Dr. Loewen ordered a MRI examination of claimant's left shoulder. The MRI examination showed an anterior labral tear of the left shoulder. On May 10, 2001, Dr. Loewen performed arthroscopic surgery on claimant's left shoulder to repair the left anterior labral tear. Post-surgery claimant was placed in a physical therapy program.

Claimant testified that he returned to work the day after Labor Day in September 2001. He returned to work with restrictions of a single lift limited to 50 pounds, no repetitive lifting over 25 pounds and working only 8 hours per day. The Return to Work Permit dated September 17, 2001, signed by Dr. Loewen had the box marked for other injury or accident instead of the box indicating claimant was injured on the job working for respondent.<sup>1</sup>

After the December 5, 2001, follow up visit to Dr. Loewen's office, claimant was released for work without restrictions. Since that release, Ms. Laughlin testified claimant had not returned to health services and had not notified her that he needed to return to Dr. Loewen for continuing left shoulder problems.

On April 19, 2001, claimant completed an Application for Short Term Disability Income Benefits provided through his employment with respondent.<sup>2</sup> Claimant described his injury as occurring one year ago when he fell from some scaffolding while painting his house and four years ago his shoulder was injured while water skiing. Claimant also marked "No" on the disability form when he was asked if his condition was related to his occupation and furthermore claimant marked "No" when he was asked if he had filed, or intended to file a workers compensation claim. Additionally, claimant testified that the medical treatment he received for his left shoulder including the surgery was paid for through claimant's non-occupational health insurance.

The Board concludes that the ALJ's preliminary hearing Order should be affirmed. At this juncture of the proceedings, the Board finds the greater weight of the evidence contained in the preliminary hearing record proves claimant's left shoulder problems are more likely than not related to claimant's preexisting left shoulder condition and are not related to his work activities while employed by respondent.

**WHEREFORE**, it is the finding, decision, and order of the Board that ALJ Bruce E. Moore's March 8, 2002, preliminary hearing Order, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of May 2002.

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BOARD MEMBER

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<sup>1</sup> See Prel. Hrg. Trans., March 8, 2002, Resp.'s Exhibit 5.

<sup>2</sup> See Prel. Hrg. Trans., March 8, 2002, Resp.'s Exhibit 3.

c: Kevin T. Stamper, Attorney for Claimant  
Larry D. Shoaf, Attorney for Respondent  
Bruce E. Moore, Administrative Law Judge  
Philip S. Harness, Workers Compensation Director